IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 15, 2008 Session

STATE OF TENNESSEE FOR THE USE AND BENEFIT OF WILLIAMSON COUNTY ON RELATION OF WALTER J. DAVIS, TRUSTEE OF SAID COUNTY, ET AL.
V.
A&F CONSTRUCTION, ET AL. DELINQUENT TAXPAYERS FOR 2002 INCLUDING: LANDSCAPE CONTRACTORS, INC.; CATERPILLAR FINANCIAL SERVICES CORPORATION; CNH CAPITAL AMERICA, LLC (F/K/A NEW HOLLAND CREDIT COMPANY, LLC)

Direct Appeal from the Chancery Court of Williamson County
No. 30499 Robert E. Lee Davies, Chancellor

No. M2008-00360-COA-R3-CV - Filed February 26, 2009

This case involves a dispute between Williamson County and the secured creditors of a delinquent taxpayer over priority. The trial court granted summary judgment to the defendants in this suit for delinquent *ad valorem* property taxes after finding that the defendants' purchase money security interests in certain property had priority over the plaintiffs' statutory lien. We conclude that the "first lien" created by Tenn. Code Ann. § 67-5-2102 attaches to all interests in the property, with no exclusions for purchase money security interests. Accordingly, we reverse the judgment of the Chancery Court and remand for further proceedings.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Reversed and Remanded

WALTER C. KURTZ, SR. J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J., and RICHARD H. DINKINS, J., joined.

S. Madison Roberts, IV, Franklin, Tennessee, for the appellant, State of Tennessee, for the use and benefit of Williamson County on relation of Walter J. Davis, Trustee of said County, et al.

Sabin R. Thompson, Nashville, Tennessee, for the appellee, CNH Capital America, LLC f/k/a New Holland Credit Company, LLC.

Austin L. McMullen, Nashville, Tennessee, for the appellee, Caterpillar Financial Services Corporation.

OPINION

I

A

This case arises out of a priority dispute between two secured creditors and Williamson County**.** Both secured creditors hold purchase money security interests in tractors that were sold to Landscape Contractors, Inc (hereinafter "LC"). Williamson County and the City of Thompson Station (hereinafter "the County") have asserted a "first lien" against LC for delinquent *ad valorem* personal property taxes which were assessed for the years 2000 - 2005 against LC's business use personal property (including the two tractors in question). When LC defaulted on the loans for both tractors, both secured creditors repossessed the tractors and sold them pursuant to Title 47, Chapter 9. The County subsequently asserted that its "first lien" has priority over the purchase money security interests held by the secured creditors and it is thus entitled to the proceeds from the sales of the tractors.

Beginning January 1, 2000, and repeating each January 1 for the years 2001-2005, Williamson County and the City of Thompson Station assessed *ad valorem* property taxes against the business use personal property of LC.

On July 14, 1999, Thompson Machinery, LP (hereinafter "Thompson") loaned $107,675.63 to LC to purchase a Caterpillar tractor (hereinafter "the CAT Tractor"). Thompson took back a purchase money security interest in the CAT Tractor to secure the loan. Thompson then assigned the loan and the purchase money security interest in the CAT Tractor to Caterpillar Financial Services Corporation (hereinafter "CAT"). CAT perfected its purchase money security interest in the CAT Tractor on July 27, 1999, by a UCC filing

LC defaulted on the loan, and CAT repossessed the CAT Tractor. CAT subsequently sold the CAT Tractor on or about February 9, 2005, to a third party for the gross price of $55,000.00, with $7,080.00 withheld for repairs and inspection, and $8,000.00 withheld for transportation, resulting in a net sum to CAT of $47,120.00. This net sum did not fully satisfy CAT's purchase money security interest. CAT did not withhold any funds from the sale proceeds in order to pay outstanding personal property taxes owed by LC, pursuant to Tenn. Code Ann. § 67-5-2003(h).

On April 2, 2001, Green River Equipment & Supply, Inc. (hereinafter "Green River") loaned LC $70,393.00 to purchase a second tractor (hereinafter "the CNH Tractor"). Green River took back a purchase money security interest in the CNH Tractor to secure the loan, which was subsequently assigned to CNH Capital America, LLC (hereinafter "CNH"). CNH perfected its purchase money security interest in the CNH Tractor on April 18, 2001, by a UCC filing.

LC defaulted on the loan and CNH repossessed the CNH Tractor. CNH then sold the CNH tractor to a third party at a gross price of $38,500.00. This sale did not fully satisfy CNH's purchase money security interest. These funds were deposited with the Chancery Court of Williamson County, pursuant to a Consent Order executed by the parties to this action, to be held in escrow pending the resolution of this litigation.

B

Pursuant to Tenn. Code Ann. § 67-5-2404, the County filed a mass lawsuit in 2004 to collect delinquent *ad valorem* real and personal property taxes by enforcement of its statutory "first lien".

On November 9, 2004, the County amended its complaint to include CAT and CNH as Defendants to the lawsuit. The County sought a judgment for personal liability against CAT for failing to comply with the withholding requirements of Tenn. Code Ann. § 67-5-2003 following CAT's repossession and sale of the CAT Tractor that was included in the County's "first lien". The County also sought an Order from the Chancery Court recognizing the County's tax lien's superiority to the security interests of both CAT and CNH in the personal property covered by the County's lien.

The parties filed cross motions for summary judgment and the Chancery Court issued a Memorandum Opinion on December 7, 2007, which granted summary judgment to CAT and CNH and denied summary judgment to the County.

In the memorandum opinion issued on December 7, 2007, the Chancery Court held that the status of CAT and CNH's security interests as purchase money security interests conferred priority over the County's "first lien". Specifically, the Chancery Court applied the holding of *Commerce Union Bank v. Possum Holler*, 620 S.W.2d 487 (Tenn. 1981), to the *ad valorem* tax lien set forth in Tenn. Code Ann. § 67-5-2101. The Chancery Court further held that, "Tenn. Code Ann. § 67-5-2003(h) only requires a secured creditor to withhold such amount toward the County's tax lien which corresponds to the taxpayer's net after the lender is reimbursed." Because each sale in the instant case resulted in a deficiency, the Chancery Court held that Tenn. Code Ann. § 67-5-2003(h) was not applicable and the County did not have priority. The County appealed.

II

The only issue upon appeal is whether the Chancery Court correctly granted summary judgment to CAT and CNH upon determining the priority dispute between the County's *ad valorem* personal property tax lien and the purchase money security interests held in the same property by CAT and CNH.

There are no material issues in dispute and resolution of the issue is purely a matter of law. Therefore, we review the Chancery Court's conclusions of law *de novo*,

without any presumption of correctness. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 924 (Tenn. 1998)*; Nutt v. Champion Int'l Corp.,* 980 S.W.2d 365, 367 (Tenn. 1998).

Summary judgment is appropriate only when the moving party can demonstrate that there are no disputed issues of material fact, and that it is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Martin v. Norfolk Southern Railway*, 271 S.W.3d 76, 83 (Tenn. 2008); *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993). The resolution of a motion for summary judgment is a matter of law. We review an award of summary judgment *de novo*, with no presumption of correctness afforded to the trial court. *Guy v. Mut. Of Omaha Ins. Co.*, 79 S.W.3d 528, 534 (Tenn. 2002).

This is an issue of first impression in Tennessee and involves the interpretation of several tax statutes. When interpreting a statute, our primary purpose is to ascertain and give effect to the intention of the legislature. *See, e.g., Lipscomb v. Doe*, 32 S.W.3d 840, 844 (Tenn. 2000). We ascertain legislative intent, whenever possible, from the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language. *Hawks v. City of Westmoreland*, 960 S.W.2d 10, 16 (Tenn. 1997). Furthermore, statutory language must be read in the context of the entire statutory scheme. *National Gas Distribs., Inc. v. State*, 804 S.W.2d 66, 67 (Tenn. 1991).

These rules of statutory construction apply equally to statutes regarding tax liens. Taxes are statutory creations and are not liens unless expressly made so by statute. *Johnson City v. Press, Inc.,* 100 S.W.2d 657, 659 (Tenn. 1937). Doubts as to the application of a tax statute should be resolved in favor of the citizen and will be construed most strongly against the state. *Union Carbide Corp. v. Lamar Alexander et al.*, 679 S.W.2d 938, 942 (Tenn. 1984). However, tax liens are not to be enlarged or restricted by construction, and any exemptions or exceptions relating to taxation must positively appear by the statute and not by implication. *American Nat. Bank & Trust Co. of Chattanooga v. MacFarland*, 352 S.W.2d 441, 443 (Tenn. 1961)**;** *Johnson City v. Press, Inc.* 100 S.W.2d at 659.

III

A

The first issue upon appeal is whether, despite the County's "first lien" status, the purchase money security interests held by CAT and CNH have priority over the tax lien. The County argues that Tenn. Code Ann. § 67-5-2101 mandates a plain, clear and unambiguous priority rule that *ad valorem* personal property taxes are the "first lien" on taxed property. The County additionally argues that the Chancery Court erred when it held that CAT and CNH's purchase money security interests in the tractors prevented the tax lien from attaching to them.

The County argues that Tenn. Code Ann. § 67-5-2101(a) gives it a "first lien" on the debtor's property, including the two tractors at issue here. Tenn. Code Ann. § 67-5-2101(a) states that:

> The taxes assessed by the state of Tennessee, a county, or municipality, taxing district, or other local governmental entity, upon any property of whatever kind, and all penalties, interest, and costs accruing thereon, shall become and remain a first lien upon such property from January 1 of the year for which such taxes are assessed.

Tenn. Code Ann. § 67-5-2101(a)

Under the plain language of this provision, the County has a "first lien" upon the subject property regardless of when CAT and CNH perfected their security interests in the tractors.

The Chancery Court relied upon the holding in *Commerce Union Bank v. Possum Holler*, 620 S.W.2d 487 (Tenn. 1981), for the proposition that a purchase money security interest prevents the debtor from owning the collateral outright, thus preventing the attachment of the appellant's tax lien.[1] *Commerce Union Bank* involved a State lien on property to collect delinquent sales and beverage taxes. The Supreme Court found that the purchase money security interest held by the bank prevented the debtor from owning any interest in the property other than an equitable interest. As such, there was no interest to which the tax lien could attach and the purchase money security interest took priority over the State's tax lien. *Commerce Union Bank v. Possum Holler*, 620 S.W.2d at 493.

The statute which the Supreme Court construed in *Commerce Union Bank* was not as broad as the property lien set forth in Tenn. Code Ann. § 67-5-2102. The lien in the former statute attached to all interests in property owned or subsequently acquired by the person against whom the assessment was made. *Commerce Union Bank v. Possum Holler*, 620 S.W.2d at 492. Tenn. Code Ann. § 67-5-2102, on the other hand, states:

> a) This lien shall extend to each and every part of all tracts or lots of land, and to every species of taxable property, notwithstanding any division or alienation thereof, or assessing or advertising the same in the name of persons not actually owners thereof at the time of the sale, or though the owner be unknown. However, there shall be no lien against leased personal property assessed to a lessee.
>
> b) Such taxes shall be a lien upon the fee in the property, and not merely upon the interest of the person to whom the property is or ought to be assessed, but to

---

[1]The Chancery Court rejected the other two arguments made by CAT and CNH, that they were the beneficiaries of the priority established in TEPA and that the County was required to issue a distress warrant. These arguments will be addressed separately below.

> any and all other interests in the property, whether in reversion or remainder, or of lienors, or of any nature whatever.

Tenn. Code Ann. § 67-5-2102.

As this language shows, the County's "first lien" did not simply attach to the interest owned by LC. The taxes are a lien upon the fee in the property and the lien extends to any and all other interests in the property, including the interests of lienors and interests "of any nature whatever." This language is certainly broad enough to include purchase money security interests like those held by CAT and CNH.

While the Chancery Court found that the statute did not express the intent that the property tax lien should attach to property held subject to a purchase money security interest, we find to the contrary. As stated above, we ascertain legislative intent, whenever possible, from the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language. *Hawks v. City of Westmoreland*, 960 S.W.2d at 16. In accordance with this principle, the plain language of this statute provides that the County's "first lien" extends to every aspect of the property and to any and all interests in the property, including the interests of lienors and interests of any nature whatever. Tenn. Code Ann. § 67-5-2102.

If the Legislature had intended to exclude purchase money security interests from the reach of this statute, it would have expressly done so in the language of the statute. While the Legislature did provide an exception in this statutory scheme for leased personal property, no similar exception appears for purchase money security interests. In light of the broad language of Tenn. Code Ann. § 67-5-2102 and in the absence of a positive exception for purchase money security interests, it is clear to this Court that the Legislature intended for the property tax lien to extend to purchase money security interests. Therefore, we hold that *Commerce Union Bank* does not apply to the case at hand and the County's "first lien" extended to the purchase money security interests held by CAT and CNH, thus allowing the lien to attach to the property in question.

We find further support for this holding in the nature of the taxes in question. *Commerce Union Bank* involved privilege taxes. A privilege tax is not directly related to any property, but is imposed upon persons or businesses engaged in doing some specific act. *Tennessee Trailways v. Butler*, 373 S.W.2d 201, 203-4 (Tenn. 1963). Property taxes, however, are imposed directly upon the property and the tax follows the property into any hands that it may pass. *Id.* Based on this fundamental difference, courts have consistently rejected efforts to "blur the line" between the two types of taxes. *See, e.g., Covenant Cmty. Church v. Lowe*, 698 S.W.2d 339, 342 (Tenn. 1985); *Commerce Union Bank v. State Bd. Of Equal.*, 615 S.W.2d 151, 152 (Tenn. 1981); *Willingham v. Gallatin Group, Inc.*, 2001 WL 134599 (Tenn. Ct. App. 2001); *Town of Algood v. Mid-South Pavers, Inc.*, 569 S.W.2d 848, 850 (Tenn. Ct. App. 1978).

With this distinction in mind, the Legislature's intent for the broad reach of the "first lien" is even clearer. Unlike *Commerce Union Bank*, the County's *ad valorem* personal property taxes attach directly to the property itself, not to the individual

taxpayer's use of the property. Thus, the tax lien on the property naturally extends beyond the interests of any one taxpayer to include all those who own any interests in the property in question. That the County's "first lien" arises from the assessment of *ad valorem* personal property taxes makes this instant case factually distinguishable from *Commerce Union Bank*. Because the plain language of Tenn. Code Ann. § 67-5-2102(b) extends the "first lien" to every interest in the property, including the interests of other lienors and interests of any nature whatever, we hold that the County's "first lien" attached to the property upon assessment and has priority over the purchase money security interests held by CAT and CNH.

After reviewing the holding in *Commerce Union Bank*, the relevant tax statutes in effect at the time of that holding, and the current relevant tax statutes, we hold that the County's "first lien" did attach to the property in question upon assessment and thus has priority over the purchase money security interests held by CAT and CNH. The natural and ordinary language of the statutory scheme reveals the Legislature's intent to include purchase money security interests within the tax lien created by Tenn. Code Ann. § 67-5-2102. Thus, the purchase money security interests held by CAT and CNH did not prevent the County's "first lien" from attaching to the tractors.

Once the "first lien" attaches and has its lawful priority, then pursuant to Tenn. Code Ann. § 67-5-2003(h) the secured creditors must satisfy the *ad valorem* personal property tax lien before satisfying their own interests.

B

CAT and CNH alternatively argue that they are the beneficiaries of the priority established in the Tax Enforcement Procedures Act ("TEPA"). Tenn. Code Ann. § 67-1-1403(c) provides that:

> the lien of the state of Tennessee for taxes or fees, or both, shall be superior to all liens and security interests created under Tennessee law except: ...
>
> > (3) security interests created pursuant to Article 9 of the Uniform Commercial Code, compiled in title 47, chapter 9, which require filing for perfection and which are properly filed prior to recordation of the notice of the state lien;
>
> Tenn. Code Ann. § 67-1-1403(c)

Thus, if TEPA were to apply, the purchase money security interests held by CAT and CNH would have priority over the County's tax lien. However, because TEPA applies only to state taxes collectible by the state commissioner of revenue, in this suit by the County, the priority created by TEPA does not apply.

TEPA does not apply to this action because the Commissioner of Revenue does not have the power to assess and collect *ad valorem* personal property taxes, which are covered by Chapter 5 of Title 67 of the Code. The stated purpose of TEPA is to

supplement and clarify the existing provisions of general law relating to the enforcement of state taxes. Tenn. Code Ann. § 67-1-1402(b). The provisions of TEPA apply to "every public tax, license or fee, and/or any penalty or interest payable thereon... collectible by the commissioner of revenue." Tenn. Code Ann. § 67-1-1402(a). The Commissioner of Revenue's tax collection powers extend to all State taxes, but do not include the power to collect *ad valorem* personal property taxes such as those at issue here. Tenn. Code Ann. § 4-3-1903. The plain language of these statutes establishes that TEPA applies only to State taxes collectible by the Commissioner of Revenue. Because the Commissioner of Revenue does not have the power to collect the County's *ad valorem* personal property taxes, we hold that TEPA does not apply.

C

CAT and CNH next argue that because the County failed to issue a distress warrant as required by *Edmonson v. Walker*, 195 S.W. 168, 172 (Tenn. 1917), the tax lien never attached to the tractors. It is undisputed that no distress warrant was issued here. We find, however, that *Edmonson* is no longer good law because Tenn. Code Ann. § 67-5-2003 no longer mandates the use of a distress warrant..

The County was not required to issue a distress warrant prior to attachment because Tenn. Code Ann. § 67-5-2003 no longer makes issuance of a distress warrant mandatory. The Court in *Edmonson* held that "there is no lien against personalty for taxes, as such, without the issuance of distress warrants, as provided for in Thomp. Shan.'s Code, §§ 876, 877." *Id.* at 172. The statute in effect when *Edmonson* was decided mandated that all remaining unpaid taxes shall be collected by distress and sale. *See* 1907 Acts, c. 602, § 49; Thomp. Shan.'s Code § 876. In 1987, the Legislature amended the statute, now Tenn. Code Ann. § 67-5-2003, to read, in part, "[t]hese delinquent personal property taxes may be immediately collected by distraint (distress warrant) and sale of any personal property liable therefor, by suit at law against the taxpayer, and/or by garnishment." Tenn. Code Ann. § 67-5-2003(b). By removing the mandate that formed the basis of the *Edmonson* holding, the Legislature made issuance of a distress warrant now merely an option, not a requirement.

The change in the operative language of subsection (b) from "shall" to "may" evidences a Legislative intent to make issuance of a distress warrant an option, rather than a requirement, for collection. It would be inconsistent to find that a distress warrant is necessary for the lien to attach when a distress warrant is no longer required to collect. The addition of subsection (h) and its recognition of the "first lien" created by Tenn. Code Ann. § 67-5-2101 is further evidence that the Legislature intended for the lien to attach to every interest in the property, including purchase money security interests, upon assessment regardless of whether or not there was a distress warrant. As such, the rule of law set out in *Edmonson* is no longer applicable and the County was not required to issue a distress warrant.

V

The final issue raised upon this appeal concerns the amount that the County is entitled to collect from CAT and CNH pursuant to Tenn. Code Ann. § 67-5-2003(h). CAT argues that if it is personally liable under Tenn. Code Ann. § 67-5-2003(h), any liability should be limited to the prorata amount specifically assessable against these particular tractors. In other words, would the creditor have to pay all the taxes owed by the debtor. We find that this issue is not appropriate for resolution because it was not decided below. We therefore pretermit this issue, leaving it to be addressed by the Chancery Court upon remand.

VI

For the reasons expressed above, the decision of the Chancery Court granting summary judgment to CAT and CNH and denying summary judgment to the County is reversed and this case is remanded for further proceedings consistent with this opinion. Costs of this of appeal are taxed equally to CAT and CNH, for which execution may issue if necessary.

_____
Walter C. Kurtz, Senior Judge